TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 33

ADVANCE-RUMELY THRESHER COMPANY, INC., APPELLANT,

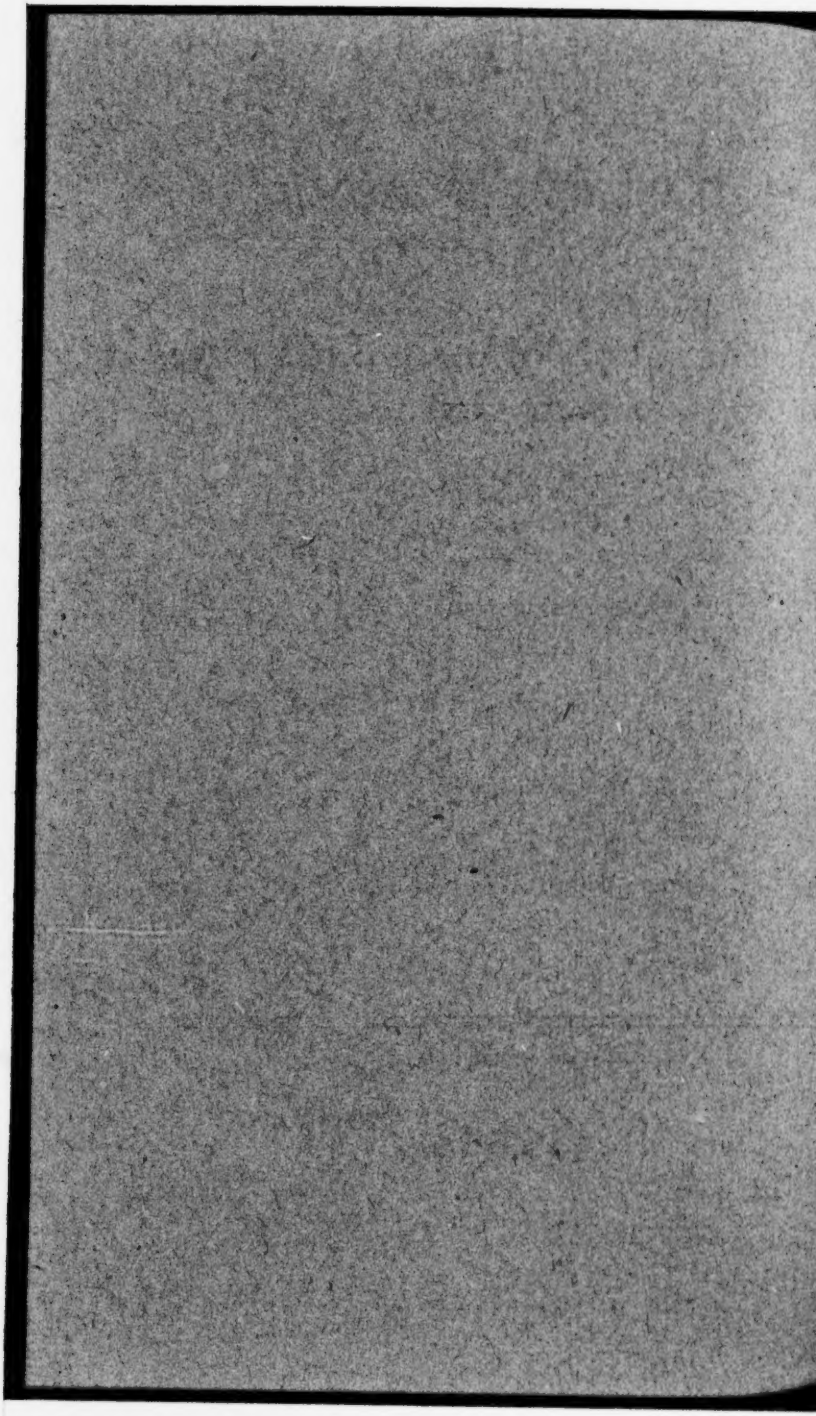
vs.

A. M. JACKSON

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

FILED APRIL 4, 1932

(36,663)



(36,663)

SUPREME COURT OF THE UNITED STATES

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vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1932

[fol. 1]

IN DISTRICT COURT OF HETTINGER COUNTY, SIXTH JUDICIAL DISTRICT

A. M. Jackson, Plaintiff,

vs.

Advance-Rumely Thresher Company, Inc., a Corporation, Defendant

Summons and Service—Filed Dec. 10, 1931

The State of North Dakota to the above-named defendant:

You are hereby summoned to answer the complaint in the above entitled action, of which a copy is hereunto attached and herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber at their office in the City of Mott in said County and State, within thirty days after the service of this summons upon you, exclusive of the day of such service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated at Mott, North Dakota, this 13th day of July, 1931.

Jacobsen & Murray, Attorneys for Plaintiff, Mott, North Dakota.

Due and personal service of the foregoing summons and complaint upon the defendant is admitted this 15th day of July, 1931.

Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant.

[fol. 2] [File endorsement omitted.]

In District Court of Hettinger County

[Title omitted]

Complaint—Filed Dec. 10, 1931

The plaintiff for cause of action against the defendant alleges:

For a first cause of action:

1

That defendant is and at all times herein mentioned has been a foreign corporation duly licensed to transact business in the State of North Dakota.

2

That at all the times herein mentioned the plaintiff was and is a farmer; that on or about the 13th day of August, 1928, the plaintiff purchased of and from defendant, and there was delivered by defendant to plaintiff, a certain harvester-combine, the same being a machine constructed for [fol. 3] the purpose of cutting, harvesting and threshing grain in a single operation; and that in payment for the same the plaintiff made and delivered to defendant three certain promissory notes in writing payable as follows: to wit: $250.00 on demand, $555.00 September 1, 1928, and $555.00 September 1, 1929, all of which notes are held by the defendant and no part of which have been paid.

3

That the said harvesting and threshing machine was so purchased by plaintiff from the defendant for the personal use of this plaintiff, towit: For the harvesting and threshing of grain crops raised by plaintiff on farm lands, all as the defendant well knew and was informed at the time of the purchase of said harvester-combine by plaintiff.

4

That during the period of two weeks following said purchase the plaintiff undertook to use and operate the said harvester-combine upon his farms and in his grain fields in the County of Hettinger, North Dakota, for the purpose of harvesting and threshing grain and gave said machine a fair trial and test. But plaintiff alleges that said machine could not be operated properly to harvest and thresh grain; that repeated attempts were made by the plaintiff to make the said machine operate efficiently and satisfactorily, but that said machine was and is defective in workmanship and [fol. 4] material and unfit for use as a machine to harvest and thresh grain; that parts of said machinery were de-

fective and could not, by adjustments or repairs undertaken by plaintiff, be made to operate successfully.

5

That thereafter and on or about the 5th day of September, 1928, the plaintiff rescinded his purchase of said harvester-combine and gave notice to the defendant and its agents who negotiated the sale thereof, that the plaintiff would refuse to pay the promissory notes given for the said combine; that plaintiff demanded the return of said promissory notes to himself; that the said machine had been placed at the disposal of said defendant and that the same would be held subject to the order of the defendant as its property.

6

That said rescission and offer thereof on the part of plaintiff, was in all things rejected and refused by defendant; that defendant refused to surrender the said promissory notes to plaintiff and refused to retake or accept possession or delivery of the said machine. That said machine still remains in the possession of plaintiff but nevertheless at the disposal of the defendant, and subject to such disposition as the defendant may desire to make thereof and that delivery of the same is hereby tendered and offered to the defendant; that said machine is in the same condition as when purchased.

[fol. 5] Plaintiff alleges that under and by reason of the terms of Chapter 238 of the Session Laws of the State of North Dakota for the year 1919 plaintiff, as a matter of contract between the parties had a reasonable time after delivery of the said machine by defendant to inspect and test the same; that the said machine was inspected and tested within a reasonable time after its delivery as hereinbefore alleged; that the same did not prove to be reasonably fit for the purpose for which the said machine was purchased and the said sale was duly rescinded in conformity with the provisions of said Chapter 238 of the Session Laws of 1919, and that plaintiff is entitled to a return and recovery of the promissory notes above described.

Wherefore plaintiff demands judgment against the defendant for the return to this plaintiff of each and all of the promissory notes described and mentioned in the fore-

going complaint together with plaintiff's costs and disbursements herein.

Dated this 13th day of July, 1931.

Jacobsen & Murray, Attorneys for Plaintiff, Mott, North Dakota.

[File endorsement omitted.]

[fol. 6] Appearances of counsel omitted in printing.

[fol. 7] In District Court of Hettinger County

[Title omitted]

Answer—Filed Dec. 10, 1931

The defendant, for answer to plaintiff's complaint, admits, for the purposes of suit, the allegations of fact contained in said complaint and, waiving any imperfection or insufficiency of allegation in said complaint, the defendant admits that plaintiff is entitled to the relief demanded if Chapter 238 of the Session Laws of 1919 is not void and unconstitutional.

And for a separate and distinct defense to said complaint the defendant, by way of new matter:

I

Admits that plaintiff was engaged in farming at the time of the purchase of the harvester-combine described in the complaint and that plaintiff purchased the same for his own personal use in the harvesting and threshing of his own crops, and so informed the defendant at the time of purchase. But defendant alleges that, at the time of said purchase and for more than a year prior thereto, plaintiff was also engaged in the business of selling farm machinery [fol. 8] as a dealer at retail; that, as such dealer, the plaintiff handled the commodities of defendant, among other things, purchasing the same at wholesale prices and making sales thereof at retail prices. That, by reason of the facts aforesaid, plaintiff, though purchasing said machine for his own personal use as aforesaid, was given the benefit of a

purchase price of said harvester-combine substantially less than the retail price of said machine, and, in consideration of such reduced price, the plaintiff made and entered into a certain written order or contract, with defendant, for the purchase of said machine, wherein and whereby the plaintiff contracted and agreed that the said machine was purchased without warranty of any kind, with respect to material or workmanship, fitness for the purpose of purchase, or otherwise, and that the plaintiff as such purchaser would and did waive any and all warranties of every kind, express, implied or statutory, and all right to claim or demand any remedy for the breach thereof, and did agree unconditionally to pay the purchase price of said machine as represented by the promissory notes described in the complaint.

II

And the defendant respectfully submits to the Court that Chapter 238 of the Session Laws of the State of North Dakota for the year 1919 shows upon its face that the same purports to authorize an unconstitutional interference with [fol. 9] the freedom of this defendant and of this plaintiff to contract as hereinbefore alleged, and imposes an arbitrary and unreasonable burden upon the conduct of its business by defendant; that said statute deprives the defendant of its property and its property right to contract, as aforesaid, without due process of law; that the said statute denies to the defendant the protection of the laws in equality with other persons engaged in the manufacture and sale of commodities other than but of like kind as those described and classified in the said statute; and that the said Chapter 238 of the Session Laws of the State of North Dakota for the year 1919 violates the provisions of the 14th Amendment to the Constitution of the United States, of all which facts the defendant waives the right to make proof save and except as the allegations of this paragraph are matters of common, historical, or judicial knowledge.

Wherefore Defendant demands judgment that the plaintiff take nothing by his said complaint and the defendant have its costs and disbursements herein.

Dated August 6, 1931.

Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant.

[fol. 10] Due and personal service of the within Answer by copy is hereby admitted this 6th day of August, 1931.

Jacobsen & Murray, Attorneys for Plaintiff, Mott, N. D.

[File endorsement omitted.]

In District Court of Hettinger County

[Title omitted]

Demurrer—Filed Dec. 10, 1931

Comes now the plaintiff and for demurrer to the alleged separate defense of defendant's answer herein, and says:

1

That said separate defense of new matter in the answer of defendant shows upon the face thereof that the same does not set forth or allege facts sufficient to constitute a defense to plaintiff's complaint; that the said separate defense purports to allege and set forth a waiver of the plain-
[fol. 11] tiff, by contract, to assert and demand the rights and relief afforded plaintiff under the provisions of Chapter 238 of the Session Laws of 1919, which alleged contract of waiver, by plaintiff, is void under the provisions of said statute.

Wherefore plaintiff demands judgment that defendant take nothing by its said answer and that plaintiff have judgment as prayed for in his complaint.

Dated August 10, 1931.

Jacobsen & Murray, Attorneys for Plaintiff, Mott, North Dakota.

Service admitted Aug. 10, 1931.

Lawrence, Murphy, Fuller & Powers, Attorneys for Plaintiff, Mott, North Dakota.

[File endorsement omitted.]

IN DISTRICT COURT OF HETTINGER COUNTY

[Title omitted]

STIPULATION FOR HEARING DEMURRER—Filed Dec. 10, 1931

It is stipulated and agreed by and between the under-
[fol. 12] signed attorneys for the above named parties, respectively, that notice of hearing on plaintiff's demurrer to the defendant's answer shall be waived and that the said demurrer shall be submitted for hearing, trial and decision of the Court whenever the parties, through their attorneys, may find it convenient to appear.

Dated August 10, 1931.

Jacobsen & Murray, Attorneys for Plaintiff.
Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF HETTINGER COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed Dec. 10, 1931

The above entitled matter having come on regularly before the court the day and year below written for trial and hearing upon the plaintiff's demurrer to the new mat-
[fol. 13] ter or separate defense alleged in the defendant's answer; J. K. Murray of the law firm of Jacobsen & Murray of Mott, North Dakota, appearing for plaintiff, and Howard G. Fuller of the law firm of Lawrence, Murphy, Fuller & Powers of Fargo, North Dakota, for the defendant; the Court having heard the arguments of counsel and being fully advised in the premises; and it appearing to the satisfaction of the Court that the only question involved in a determination of the sufficiency of the defendant's answer is a question as to the validity of Chapter 238 of the Session Laws of the State of North Dakota, for the year 1919; and the Court being of the opinion that the said statute is in all things a valid and constitutional enactment, and that the contract of waiver of warranty on the sale of farm

machinery by defendant to plaintiff, as alleged in the answer, is void under and on account of said statute;

It is now ordered and adjudged that the plaintiff's demurrer to the separate defense of defendant in its answer contained shall be and the same is hereby sustained and, to this ruling the defendant having excepted the said exception is allowed.

And it further appearing to the Court that the defendant has elected to stand upon its answer and to waive all right to ask leave to amend said answer; and the plaintiff having, accordingly, moved for judgment:

[fol. 14] It is further ordered that plaintiff shall have and recover of defendant judgment as prayed for in the complaint and that judgment shall be entered herein in favor of plaintiff and against the defendant adjudging plaintiff to be the owner of and entitled to the recovery from defendant of the promissory notes described in the complaint, and that said notes shall be surrendered and delivered up to plaintiff for cancellation. To which ruling the defendant having excepted said exception is allowed.

Dated December 5th, 1931.

By the Court:

H. L. Berry, Judge.

[File endorsement omitted.]

[fol. 15] In District Court of Hettinger County

[Title omitted]

Judgment—Filed Dec. 10, 1931

The above entitled matter having come on regularly before the court the day and year below written for trial and hearing upon the plaintiff's demurrer to the new matter or separate defense alleged in the defendant's answer; J. K. Murray of the law firm of Jacobsen & Murray of Mott, North Dakota, appearing for plaintiff, and Howard G. Fuller of the law firm of Lawrence, Murphy, Fuller & Powers of Fargo, North Dakota, for the defendant; the Court having heard the arguments of counsel and being fully advised in the premises; and it appearing to the satisfaction of the Court that the only question involved

in a determination of the sufficiency of the defendant's answer is a question as to the validity of Chapter 238 of the Session Laws of the State of North Dakota, for the year 1919; and the Court being of the opinion that the said statute is in all things a valid and constitutional enactment, and that the contract of waiver of warranty on the sale of farm machinery by defendant to plaintiff, as alleged in the answer, is void under and on account of said statute; and [fol. 16] the Court having made and entered its order sustaining the said demurrer; and the defendant having elected to stand upon its said answer; and the Court having made its order for the entry of this judgment;

On motion of Jacobsen & Murray, attorneys for plaintiff, it is now ordered, adjudged and decreed that the certain purchase, by the plaintiff made of the defendant of a certain harvester-combine on or about August 13, 1928, was duly rescinded and terminated by plaintiff on or about the 5th day of September, 1928, and that plaintiff is entitled to a return from defendant of the consideration paid for the said harvester-combine, to wit: certain promissory notes herein described.

And it is ordered, adjudged and decreed that the plaintiff is the owner of and entitled to the possession of three certain promissory notes by plaintiff executed and to the defendant payable, dated on or about August 13, 1928, and payable $250.00 on demand; $555.00 September 1, 1928, and $555.00 on September 1, 1929, and that the same shall be surrendered up by the defendant and delivered into the hands of the clerk of this court for cancellation and surrender to the plaintiff; and the plaintiff shall have his costs and disbursements to b- hereinafter taxed and inserted [fol. 17] in this judgment in the sum of Twelve and no/100 ($12.00) Dollars.

Witness the Hon. H. L. Berry, Judge of said District Court, my hand and the seal of said Court this 10th day of December, 1931.

Henry Barry, Clerk of District Court. (Seal.)

[File endorsement omitted.]

In District Court of Hettinger County

[Title omitted]

Stipulation as to Costs—Filed Dec. 10, 1931

It is stipulated by the undersigned attorneys for the above named parties, respectively, that costs may be taxed by the clerk in the above entitled action in favor of the plaintiff in the sum of Twelve Dollars ($12.00) and the [fol. 18] amount thereof inserted in the judgment herein, and notice of the taxation of costs is hereby waived.

Dated December 7, 1931.

Jacobsen & Murray, Attorneys for Plaintiff. Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Hettinger County

[Title omitted]

Notice of Appeal—Filed Dec. 19, 1931

To the plaintiff above named and his attorneys:

Please take notice that Advance-Rumely Thresher Company, Inc., a corporation, defendant above named, hereby appeals to the Supreme Court of the State of North Dakota from the judgment in favor of the above named plaintiff and against the above named defendant herein entered the [fol. 19] 10th day of December, 1931, and from the whole thereof.

Dated December 12th, 1931.

Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant and Appellant.

[File endorsement omitted.]

In District Court of Hettinger County

[Title omitted]

Specifications of Error—Filed Dec. 19, 1931

To the plaintiff above named and his attorneys:

Please take notice that the following is a statement of the specifications of error upon which the above named defendant and appellant will rely on appeal to the Supreme Court from the judgment herein entered:

Specifications of Error

The trial Court erred in the making and entry of order sustaining the plaintiff's demurrer to new matter and sepa-
[fol. 20] rate defense contained in defendant's answer, and in the making and entry of order for judgment in favor of plaintiff and against the defendant, in this that:

The contract for the waiver of warranties, express, implied or statutory, on the machine purchased by plaintiff from defendant, as alleged in defendant's answer, is valid and binding upon the parties and Chapter 238 of the Session Laws of 1919 of the State of North Dakota, upon which the plaintiff's alleged cause of action is based, is void, and does not render the contract pleaded in the answer inv-lid, for the reason that such statute contravenes and violates the provisions of the 14th Amendment to the Constitution of the United States.

Lawrence, Murphy, Fuller & Powers, Attorneys for Defendant and Appellant.

[File endorsement omitted.]

[fol. 21] In District Court of Hettinger County

[Title omitted]

Admission of Service of Notice of Appeal and Waiver of Costs Bond—Filed Dec. 19, 1931

The above named plaintiff and respondent by his attorneys, the undersigned, hereby admits due and personal

service of the attached notice of appeal and specifications of error, and the delivery of copy thereof to us at our office at the City of Mott, North Dakota, this 12th day of December, 1931; and the said plaintiff and respondent, by his attorneys, the undersigned, hereby waives the making and filing of bond for costs on appeal by the defendant and appellant, and consents that said appeal may be taken and perfected without such bond.

Dated December 12th, 1931.

Jacobsen & Murray, Attorneys for Plaintiff & Respondent.

[File endorsement omitted.]

[fol. 22] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 23] IN THE SUPREME COURT OF NORTH DAKOTA

A. M. JACKSON, Plaintiff and Respondent,

vs.

ADVANCE-RUMELY THRESHER CO., INC., a Corporation, Defendant and Appellant

OPINION

Following Bratberg v. Advance-Rumely Thresher Company, — N. D. —, 238 N. W. 552, it is held that Chapter 238 of the Session Laws of 1919 does not deny to the defendant any right guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

(Syllabus by the Court)

From a judgment of the district court of Hettinger County, Berry, J. Defendant appeals.

Per Curiam Opinion.

Affirmed.

Lawrence, Murphy, Fuller & Powers, Fargo, N. D., Attorneys for Defendant and Appellant.

Jacobson & Murray, Mott, N. D., and Wm. Lemke, Fargo, N. D., Attorneys for Plaintiff and Respondent.

[fol. 24] JACKSON

v.

ADVANCE-RUMELY THRESHING COMPANY

Per CURIAM:

Plaintiff brought this action for rescission of a contract under the terms of which the plaintiff purchased from the defendant a certain harvester-combine. In his complaint he alleges that on or about August 13, 1928, he purchased from the defendant a certain harvester-combine and that in payment thereof he executed and delivered to the plaintiff three certain promissory notes; that said machine was purchased for the personal use of the plaintiff in the harvesting and threshing of grains on farm lands in this state, all of which was known to the defendant; that the machine was unfit, and did not properly perform the work, for which it was purchased; that it was defective in workmanship and material and could not be made to operate successfully; that on or about September 5, 1928, plaintiff rescinded the purchase and gave notice of such rescission to the defendant and the agent who had negotiated the sale and that the machine had been placed at the disposal of the defendant as its property, and demanded a return of the promissory notes; that the defendant rejected the offer and refused to surrender the notes or to accept redelivery of the machine; that by virtue of the provisions of Chapter 238 of the Session Laws of North Dakota for the year 1919 plaintiff had a [fol. 25] reasonable time after the delivery of the machine to inspect and test the same; that it was so inspected and tested within a reasonable time after delivery and proved unfit for the purpose for which it was purchased and that the sale was duly rescinded in conformity with the provisions of said Chapter 238, Laws 1919 and that plaintiff is entitled to a return and redelivery of said promissory notes. The defendant interposed an answer wherein it is asserted that Chapter 238, Laws 1919, is unconstitutional in this, that it interferes with the freedom of contract; imposes an arbitrary and unreasonable burden upon business; de-

prives the defendant of its property and its right to contract without due process and denies to it the equal protection of the laws, all in violation of the guarantees of the Fourteenth Amendment to the Constitution of the United States.

The answer further alleged:

"The plaintiff contracted and agreed that said machine was purchased without warranty of any kind, with respect to material or workmanship, fitness for the purpose of purchase, or otherwise, and that plaintiff as such purchaser would and did waive any and all warranties of every kind, express, implied or statutory, and all right to claim or demand any remedy for the breach thereof, and did agree unconditionally to pay the purchase price of said machine as represented by the promissory notes described in the complaint."

The plaintiff demurred to this answer. The demurrer was sustained and judgment was entered in favor of the plaintiff.

[fol. 26] Chapter 238, Laws 1919, so far as material here, provides:

Sec. 1. "Any person * * * purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing the same at the disposal of the seller.

Sec. 2. Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void."

The objects sought to be accomplished by the enactment of this statute are clearly enunciated in the statute itself. They are to obtain for the purchaser of machinery of the

kind described in the statute "a reasonable time after delivery for the inspection and testing of the same;" and if it did "not prove to be reasonably fit for the purpose for which it was purchased", to afford the purchaser the right to "rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such property or his successor and placing the same at the disposal of the seller". At the time of the enactment of the statute, and during the entire his-[fol. 27] tory of the state prior thereto, the production of grain was and had been the basic industry of the state. Contracts for the purchase of machinery to be utilized in the production of grain were in a very real sense the most important contracts in the state. All machinery so purchased and used in this state was manufactured outside the state—the different manufacturers and distributors maintaining offices and employing sales agents within the state. The sales contracts were prepared by the seller. As a rule there was no opportunity for the purchaser to inspect the machinery at the time the contract was signed by him. Generally the contracts were in the form of an order containing extended provisions having a tendency to restrict the rights of the purchaser and the liability of the seller. In some cases such contracts contained provisions waiving all warranties, in others the warranties were so limited as to be of little or no value, such, for instance, as providing that the machinery was "warranted only against breakage caused by manifest defects in material" and thus excluding all other warranties, both expressed and implied. Of course, tractors, harvesting and threshing machinery could be tested only during the proper season, that is harvesting machinery could be tested only during the harvest season and threshing machinery could be tested only during the threshing season. It was of vital importance to the people of the state that farm machinery [fol. 28] should be fit for the purpose for which it was sold. If it failed to work and other machinery must be obtained it was essential that the purchaser should be in position to do so at once as the delay of only a few days might result in the loss of the entire crop. While the farmers in purchasing machinery dealt with agents in this state, the contracts frequently, if not generally, contained

provisions to the effect that in the event the machinery failed to comply with the warranties, written notice of this fact must be given directly to the seller at its head office within a stipulated number of days or hours after the delivery of the machine. The records of this court show that in many cases purchasers of machinery, finding it to be defective, in good faith notified the agent from whom they purchased it, or the general agent, or both, but failed to notify the head office within the time stipulated in the contract and, consequently, lost the right to assert the breach of warranty.

It is a matter of common knowledge that machinery of the kinds enumerated in the statute, much of it wholly experimental in character, was sold in large quantities in North Dakota and that in numerous cases the purchasers, on account of provisions in the sales contracts of the nature alluded to above, were required to pay for machinery that was wholly useless. In many instances farmers who purchased such machinery lost their farms as a result of the [fol. 29] financial obligations assumed by them under the contracts. The members of the legislature were, of course, fully aware of this situation. They were confronted with a condition and not with a theory and so in order to remedy that condition they enacted Chapter 238, Laws 1919, so as to assure to every purchaser of machinery of the kind described in the statute, a reasonable opportunity to test the same, coupled with a right to rescind the contract if, upon such test, the machinery was found to be unfit for the purpose for which it was purchased. And, further, to permit such purchaser to give notice of the defects in the machinery and of the rescission of the contract to the representative of the company from whom the machinery had been purchased or his successor. The legislature recognized the necessity of legislation of this nature long before the enactment of Chapter 238, Laws 1919. See Chapters 218-219, Laws 1913.

Viewed from a practical as distinguished from a legalistic standpoint it is apparent that Chapter 238, Laws 1919 has not imposed any conditions upon the purchase and sale of farm machinery that seriously interfere with such business in this state. The law became effective July 1, 1918, and since that time has affected all contracts for the purchase and sale in this state of machinery of the kind described

in the statute. Minneapolis Threshing Machine Co. v. Hock-
[fol. 30] ing, 54 N. D. 559, 209 N. W. 996. And, although there apparently has been a substantial decrease in litigation concerning farm machinery, cases have arisen involving the construction and application of the statute (See, Minneapolis Threshing Machine Co., v. Hocking, 54 N. D. 559, 209 N. W. 996; Palaniuk v. Allis-Chalmers Mfg. Co., 57 N. D. 199, 220 N. W. 638; Allis-Chalmers Mfg. Co., v. Frank, 57 N. D. 295, 221 N. W. 75; Dwinnell v. Boehmer, 60 N. D. 302, 234 N. W. 655; Bratberg v. Advance-Rumely Thresher Co., — N. D. —, 238 N. W. 552; Holden v. Advance-Rumley Thresher Co., — N. D. —, 239 N. W. 479; Jesperson v. Advance-Rumely Thresher Co., — N. D. —, 240 N. W. 876); but the validity of the law was first drawn in question in Bratberg v. Advance-Rumely Thresher Co., supra, which involved a contract made more than eight years, and litigation which arose more than ten years, after the law had become effective.

It is undisputed that the machinery involved in this case is a gas and oil burning harvesting and threshing machine and, hence, falls within the class of machinery covered by the statute.

The defendant contends that the statute infringes rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States in the particulars heretofore enumerated and that, consequently, the legislature transcended its power and that the enactment is void. This
[fol. 31] question was considered at length in the recent case of Bratberg v. Advance-Rumley Thresher Co., supra. Apparently the contract involved here is the same as that which was involved and considered in that case and the machinery involved is also of like character. We deem it unnecessary to re-state at length in this opinion the reasons for the conclusions announced by us in Bratberg v. Advance-Rumely Thresher Company to the effect that the statute does not infringe upon any of the constitutional guarantees invoked by the appellant. It is sufficient to say that we still adhere to the views there expressed.

It follows therefore that the trial court was correct in holding that the plaintiff was entitled to reasonable opportunity to try the harvester-combine and that the provisions in the contract waiving the right to test the machine and to

rescind the contract were not binding upon him. The judgment appealed from is affirmed.

A. M. Christianson, John Burke, W. C. Nuessle, A. G. Burr.

[fol. 32] JACKSON

v.

ADVANCE-RUMELY THRESHER COMPANY

BIRDZELL, J. (dissenting):

In so far as the principal opinion in this case speaks of facts which point to the necessity for reasonable protection to those entering into contracts for the purchase of certain classes of farm machinery to the end that they may enjoy the ordinary legal remedies for the breach of such contracts as are made, I do not disagree with the opinion and I express no constitutional objection to such legislation. The first statutes that were passed were designed to give this protection. (Chapters 218 and 219 of the Session Laws of 1913, which are Sections 5991, 5992, 5993 and 6002 of the Compiled Laws of 1913.) These statutes did not seek to impose any warranty or other affirmative contract contrary to the real contract of the parties. They merely provided that a purchaser of personal property under written warranty should have a reasonable time in which to ascertain whether or not the property complied with the warranty and made the question of reasonable time in all cases one of fact for the jury. And they further provided that any notice of breach or of defects might be given either in writing or orally to the seller or to the seller's agent in this state who had negotiated the sale or delivered the property, or to his successor. They avoided any provision in a written contract to the contrary and any provision purporting to [fol. 33] waive any right of action arising out of the sale before the cause of action had accrued. These statutes obviated the effect of harsh contract stipulations prejudicial to the full enjoyment of ordinary legal remedies for breaches of warranties actually made. But some of them, Sections 5991 and 5992 of the Compiled Laws of 1913, were expressly repealed by Section 77 of Chapter 202, Session Laws of 1917, known as the Uniform Sales Act (This state-

ment is based upon the enrolled bill but is not borne out by the legislative journals which show that these sections were not included in the repeal section of the original bill and that the bill was never amended so as to include them), and the following legislature passed the act in question.

To my mind there is a fundamental distinction between a statute designed to protect parties in the enjoyment of ordinary legal remedies for breaches of contracts actually made and statutes imposing contracts which both parties may be unwilling to make. A statute of the latter sort, in requiring or imposing a warranty and giving a remedy of rescission to one who may later be disappointed with a bargain he knowingly and understandingly made or even solicited, enables every buyer within the statute to repudiate his real contract and shift to the other party the entire burden of the transaction.

[fol. 34] Of course, it may be said that in regulating transactions of the character referred to in the statute it is competent for the legislature to impose a contract reasonably designed to make its regulation effective (Wanberg v. National Union Fire Insurance Co., 46 N. D. 369, 179 N. W. 666, 260 U. S. 71, 43 Sup. Ct. Rep. 32; Minneapolis Threshing Machine Co. v. Hocking, 54 N. D. 559, 209 N. W 996; Palaniuk v. Allis-Chalmers Mfg. Co., 57 N. D. 199, 220 N. W. 638; Dwinnell v. Boehmer, 60 N. D. 302, 234 N. W. 655) and that parties must be held to have contracted with the statute in mind. The statute is read into the contract regardless of any stipulation to the contrary, and this court has properly and consistently so held in cases where no constitutional question was raised. But, where the constitutional right is relied upon, such a view cannot be followed to the logical conclusion of supporting every contract which may be imposed by legislation without examining the regulation thus made effective to determine whether or not it is consistent with the liberty guaranteed by the Fourteenth Amendment. As applied to contracts made in the pursuit of a calling or a business, or in the advancement of the ordinary affairs of life, there is a field for regulation and a point beyond which regulation may not be carried without infringing the liberty which is guaranteed by the Constitution.

[fol. 35] The statute supported in the Wanberg case seems to be clearly distinguishable from the one here involved.

In that case the insurance company was given a reasonable opportunity to determine whether to accept or reject the application. It required a degree of promptness and expedition appropriate to the nature of the business undertaken. Failure to perform the duty to accept or reject within such time was made tantamount to acceptance as a means of giving to the applicant the protection which he had taken the necessary steps to secure and which he would have reasonable grounds for thinking he had obtained. By this statute the legislature, in effect, said to an insurance company desiring to engage in the hail insurance business that it should make arrangements whereby those whose applications it should take would know within twenty-four hours whether or not they were protected.

The statute now before us is in no sense a regulation of the manner in which any given business is to be transacted so far as promptness, over-reaching or other element having to do with fair and just dealing, economic or social advantage is concerned. It is an assumption of legislative control over all sales of machinery of the kinds designated, despite the action of the parties; and, in effect, it says that no such contract shall be made unless accompanied by a warranty of fitness for the use for which the machine was purchased for the breach of which rescission must be allowed. If it is competent to impose this element into every [fol. 36] contract for the sale of machinery, whether new or second hand, whether made by a manufacturer, a dealer, or by a casual owner making but one sale in a lifetime, I am unable to see where any line can be drawn within which the liberty of persons to deal with each other with respect to the ordinary transactions of life is to be enjoyed. Let it be remembered that we have celebrated the hundredth anniversary of the invention of harvesting machinery which is covered by this statute and that steam engines, likewise included, antedate the American Revolution.

It is true that this case and the Bratberg case, which is followed as controlling, were both cases involving sales of combine harvesters, a type of machinery which was not in use in this state when the statute in question was enacted. In view of its novelty and of the various elements and conditions upon which its successful operation here would depend, the contract in the Bratberg case contained a warranty agreed to by the parties and stipulated against

others. The warranty reads: "When properly adjusted and competently operated according to seller's instructions on land or grain in suitable condition it will be capable of doing as good or better work than any other machine of the same kind, size and rated capacity working under like conditions on the same job." This warranty is by the statute converted into a warranty of reasonable fitness for the [fol. 37] purpose for which it was purchased. So, the statute, which dealt with types of machinery some of which was old and some comparatively new at the time of its enactment, has the effect, as to machines subsequently invented or coming into use, of preventing the parties to a sale from contracting with respect to the risk of operation and adaptability, although the novelty be known to both buyer and seller and the elements of uncertainty be equally appreciated and although there be no overreaching whatsoever.

In the opinion of the majority reference is made to the fact that there has been but little litigation under this statute. It may not be out of place to suggest that possibly this is due in some degree to the fact that it has but lately been invoked with regard to a type of machinery that was not in use here at the time of its enactment and for some five years thereafter. It might be further observed, too, by way of indicating that it is not designed or used merely as a means of protecting those who might be thought to be unfamiliar with the terms of such contracts, that in the instant case the statute is invoked by a dealer in such machinery, in another by an experienced agent or salesman of such machinery, and in still another case by a stockholder in a corporation which was a dealer.

For the above reasons and for the reasons indicated in my dissenting opinion in the Bratberg case, I think the judgment appealed from should be reversed.

L. E. Birdzell.

[fol. 38] In the Supreme Court of North Dakota

[Title omitted]

Judgment—Filed March 25, 1932

This action coming on to be heard at the January, A. D. 1932, term of this Court, at the Supreme Court rooms, in

the City of Bismarck, State of North Dakota.—Present: A. M. Christianson, Chief Justice; L. E. Birdzell, W. L. Nuessle, John Burke and A. G. Burr, Associate Justices—and the appeal herein having been submitted by Lawrence, Murphy, Fuller & Powers for the Appellant and by Jacobsen & Murray and William Lemke for Respondent, and the court having advised thereon, it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Hettinger County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered that this cause be and it is hereby remanded to the District Court for further proceed-
[fol. 39] ings according to law, and the order of this court.

And it is further considered and adjudged that Respondent have and recover of the Appellant costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated March 25, 1932.

By the Court:

A. M. Christianson, Chief Justice.

Attest:

J. H. Newton, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 40] In Supreme Court of North Dakota

[Title omitted]

Petition for Appeal—Filed March 30, 1932

To the Chief Justice of the Supreme Court of the State of North Dakota:

The Advance-Rumely Thresher Company, Inc., a foreign corporation, respectfully shows:

I

The petitioner is the appellant in the above entitled cause.

II

The appeal to this Court was from a judgment entered in the District Court of Hettinger County, North Dakota, in favor of the respondent and against appellant for the return of certain promissory notes with costs of the action.

III

That on appeal from said judgment by this petitioner to the Supreme Court of the State of North Dakota, such Court being the highest court of law and equity in said [fol. 41] state in which a decision of the matters in controversy could be had, the judgment appealed from was in all respects affirmed by the final judgment entered in the said Supreme Court on the 25th day of March, 1932.

IV

That there is error in the final judgment and the record of proceedings in this cause in the Supreme Court of the State of North Dakota, whereby petitioner is aggrieved, in that in the decision and judgment of said Court there was drawn in question the validity of a statute of the State of North Dakota, viz. Chapter 238 of the Session Laws of 1919, on the ground of the said statute being repugnant to and in contravention of the Fourteenth Amendment to the Constitution of the United States and that the decision and judgment of said Court was in favor of the validity of such statute.

V

That contemporaneously with this petition for appeal to the United States Supreme Court the petitioner herewith submits its good and sufficient costs and supersedeas bond or undertaking in an amount adequate to cover the liability represented by said judgment.

VI

Wherefore Petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of North Dakota against petitioner to [fol. 42] the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of

the State of North Dakota may be examined and reversed, and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of North Dakota, may be sent to the Supreme Court of the United States as provided by law.

And petitioner further prays that the bond and security herewith offered may be approved, and that said appeal may be allowed as a supersedeas.

The errors upon which petitioner claims to be entitled to an appeal are those more fully stated and set out in the Assignments of Error filed herewith.

Dated March 26, 1932.

M. W. Murphy, Howard G. Fuller, J. M. Powers, Fargo, North Dakota, Attorneys for Appellant and Petitioner.

[File endorsement omitted.]

[fol. 43] In Supreme Court of North Dakota

[Title omitted]

Assignments of Error—Filed March 30, 1932

Comes now Advance-Rumely Thresher Company, Inc., a corporation, appellant herein, and for its Assignments of Error on appeal to the United States Supreme Court from the final judgment of the Supreme Court of the State of North Dakota, and says that there is manifest error on the face of the record in this that;

I

The Supreme Court of the State of North Dakota erred in its decision and judgment herein appealed from in holding that Chapter 238 of the Session Laws of 1919 of said State, as applied to this appellant, is a valid exercise of the legislative authority of said State; and erred in its said decision and judgment in failing to hold that the said Chapter 238 of the Session Laws of 1919, as applied to this appellant, is unconstitutional and void as contravening the

Fourteenth Amendment of the Constitution of the United States.

[fol. 44] II

The Supreme Court of the State of North Dakota erred in its decision and judgment herein in failing to hold that the enactment of Chapter 238 of the Session Laws of 1919 of said state, and each of the two sections of said Act, as applied to this appellant, is a violation of and infringement upon the Fourteenth Amendment of the Constitution of the United States in this:

(1) That the said Act and each of the two sections thereof deprives this appellant of its property and its right to make reasonable contracts, in contravention of said statute, without due process of law;

(2) And that the said Act and each section thereof deprives this appellant of the equal protection of the laws.

III

The Supreme Court of the State of North Dakota erred in failing to hold, on facts of which the Court must take judicial knowledge and upon facts adjudged by the court, that the said statute is an arbitrary and unreasonable restraint upon the liberty of contract guaranteed to the appellant by the Fourteenth Amendment to the Constitution of the United States and that the said statute shows upon its face that it is not an appropriate or reasonable remedy for the specific public evil to avoid which the legislation was adopted; and in failing to hold, as a matter of common, historical and judicial knowledge, that there is no possi-
[fol. 45] bility of a rational basis for the legislative judgment expressed in the said enactment.

IV

The Supreme Court of the State of North Dakota erred in affirming the judgment of the District Court of the County of Hettinger, North Dakota, and in the entry of the final judgment appealed from.

Dated March 26, 1932.

M. W. Murphy, Howard G. Fuller, J. M. Powers,
Attorneys for Appellant, Fargo, North Dakota.

[File endorsement omitted.]

[fol. 46] IN SUPREME COURT OF NORTH DAKOTA

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 30, 1932

The petition of Advance-Rumely Thresher Company, Inc., a foreign corporation, appellant in the above entitled matter, for an appeal herein to the Supreme Court of the United States from the Supreme Court of the State of North Dakota, and the Assignments of Error filed therewith, and the record of said cause, having been considered:

It is ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of North Dakota as prayed in said petition and the Clerk of the Supreme Court of the State of North Dakota shall prepare and certify a transcript of the record and proceedings in the above entitled cause and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

[fol. 47] And the said appellant having presented an undertaking in the sum and amount of $2,000, it is ordered that the said undertaking and the surety thereof be and the same is hereby approved and that the appeal herein shall operate as a supersedeas.

Dated March 30, 1932.

A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota. (Seal.)

[File endorsement omitted.]

[fols. 48-50] Bond on appeal for $2,000, filed March 30, 1932, omitted in printing.

[fol. 51] Citation, in usual form, showing service on A. M. Jackson, omitted in printing.

[fol. 52] IN SUPREME COURT OF NORTH DAKOTA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 30, 1932

It is now stipulated and agreed that præcipe shall be waived and that the record to be certified to the Supreme Court of the United States from the Supreme Court of the State of North Dakota, on appeal in the above entitled case, shall contain the following:

1. The judgment roll as certified by the Clerk of the District Court of Hettinger County, North Dakota, to the Supreme Court of North Dakota.
2. Notice of appeal and stipulation re costs bond on appeal from the District Court aforesaid to the Supreme Court of North Dakota.
3. Opinion of Supreme Court of North Dakota.
4. Judgment of Supreme Court of North Dakota.
5. Petition for appeal and assignment of errors.
6. Order allowing appeal.
7. Copy of undertaking on appeal.

[fol. 53] 8. Citation.

9. This stipulation.

Dated March 30, 1932.

Jacobsen & Murphy and William Lemke, Attorneys for Appellee. Lawrence, Murphy, Fuller & Powers, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 2, 1932

Comes now the appellant in the above entitled cause and states that the points upon which appellant intends to rely and urge in this case are as follows:

Point 1. The Supreme Court of the State of North Dakota erred in its decision and judgment herein appealed from in holding that Chapter 238 of the Session Laws of 1919 of said State, as applied to this appellant, is a valid exercise of the legislative authority of said State; and erred in its said decision and judgment in failing to hold that the said Chapter 238 of the Session Laws of 1919, as applied to this appellant, is unconstitutional and void as contravening the Fourteenth Amendment of the Constitution of the United States.

Point 2. The Supreme Court of the State of North Dakota erred in its decision and judgment herein in failing to hold that the enactment of Chapter 238 of the Session Laws of 1919 of said state, and each of the two sections of said Act, as applied to this appellant, is a violation of and infringement upon the Fourteenth Amendment of the Constitution of the United States in this:

(1) That the said Act and each of the two sections thereof deprives this appellant of its property and its right to make reasonable contracts, in contravention of said statute, without due process of law;

(2) And that the said Act and each section thereof deprives this appelant of the equal protection of the laws.

[fols. 56-58] Point 3. The Supreme Court of the State of North Dakota erred in failing to hold, on facts of which the Court must take judicial knowledge and upon facts adjudged by the Court, that the said statute is an arbitrary and unreasonable restraint upon the liberty of contract guaranteed to the appellant by the Fourteenth Amendment to the Constitution of the United States and that the said statute shows upon its face that it is not an appropriate or reasonable remedy for the specific public evil to avoid which the legislation was adopted; and in failing to hold, as a matter of common, historical and judicial knowledge, that there is no possibility of a rational basis for the legislative judgment expressed in the said enactment.

Appellant further states that the present appeal is taken from a final judgment rendered by the Supreme Court of the State of North Dakota, the highest court in the state in which a decision could be had, against appellant. The

single question raised on such appeal was the constitutionality of the above mentioned statute, the validity of which was questioned as being repugnant to the Fourteenth Amendment of the Constitution of the United States, for that it deprives appellant of its property and right of contract without due process and denies appellant the equal protection of the laws. By its decision and judgment the Supreme Court of North Dakota held the statute to be valid and not in contravention of the Constitution of the United States.

Dated March 30th, 1932.

M. W. Murphy, Howard G. Fuller, J. M. Powers, Attorneys for Appellant.

Stipulation for Printing Record

The undersigned attorneys for appellee hereby admit due and personal service of the foregoing Statement of Points to be Relied upon, and said attorneys and the undersigned attorneys for Appellant now stipulate that the record to be printed by the Clerk of the Supreme Court of the United States in said cause shall comprise and include the entire record as transmitted to the above entitled court from the Supreme Court of North Dakota.

Dated March 30th, 1932.

Jacobson & Murray, and Wm. Lemke, Attorneys for Appellee. M. W. Murphy, Howard G. Fuller, J. M. Powers, Attorneys for Appellant.

Endorsed on cover: File No. 36,663. North Dakota Supreme Court. Term No. 33. Advance-Rumely Thresher Company, Inc., appellant, vs. A. M. Jackson. Filed April 4, 1932. File No. 36,663.